No. 7466

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED G. WILKES, E. BYRON SIENS, JOHN McKEON, ROBERT McKEON, MAURICE C. MYERS, WILLIAM J. CAVANAUGH, FRED SHINGLE and HORACE J. BROWN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States, in and for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE

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REPLY BRIEF OF APPELLEE

I.

Answer to Appellants' Reply as to Evidence Introduced.

1. Purchase of Italo American.

On page 5 of the McKeon reply brief it is stated that neither of the McKeons had anything to do with the purchase of Italo American by the Italo Petroleum Company. The record discloses that before Wilkes organized Italo Petroleum he called on Robert McKeon and discussed the organization of this company with him and asked him to serve as a director of Italo Petroleum (R. 1119, 1120). On March 14, 1928, Robert McKeon was elected a

director (R. 236). On March 23, 1928, an application was made to the Corporation Commissioner for a permit to issue and sell stock of the Italo Company, for the purpose of acquiring the assets of Italo American. The application contained a balance sheet of Italo American, as of February 29, 1928. Among the items set forth in the balance sheet, as constituting assets, a valuation of $200,000 is placed on a gasoline contract (R. 512). In support of this valuation there was inclosed in the application for the permit a letter on the letterhead of the Richfield Oil Company, dated March 9, 1928, signed by John McKeon, which read in part as follows:

> "Referring to the gasoline contract under July operating; after looking at a statement of your business for the first 2½ months of your operations, it is my opinion that a valuation of $200,000.00 is very conservative for this contract." (R. 513).

James F. Hynes, an accountant, testified that the gasoline and oil contracts were appreciated in the amount of $200,000 (R. 209, 210). The witness further stated:

> "What I have testified to as values is simply the values as shown by the books. The entries indicate, for example, that the gasoline and oil contract was set up on the books at $200,000 and offset by an entry to Capital Surplus of $200,000. Somebody's opinion. The books do not disclose how this value was arrived at. Somebody decided the contracts were worth that much and set it up. There was no entry indicating that the corporation paid anything for the gasoline contract. It was just set up on the books as an appreciated figure." (R. 210).

In our original brief we pointed out the close acquaintanceship that existed between Wilkes and the McKeons. In addition to this testimony, the record shows that when the officials of Italo American were contemplating placing Wilkes in charge of this company, John McKeon told Vincent that Wilkes was a good man and he would like to see Wilkes get back in the oil business, and that he, McKeon, would assist Wilkes with data. (R. 438-439).

It is further stated in the McKeon reply brief, on page 4, that there is no evidence that the assets of Italo American were worth less than the consideration paid therefor. On pages 7, 8 and 9 of our brief we have outlined that evidence which conclusively shows that the assets of Italo American were purchased for an excessive consdieration.

2. Purchase of Italo Stock by Big Syndicate.

On page 6 of the McKeon reply brief it is stated that the McKeons had no participation in the organization of the Big Syndicate. The record discloses that John McKeon testified as follows:

> "Prior to that time I had subscribed $100,000 to the syndicate, *and had induced others to subscribe to it, and I think 75 per cent of the money that went into the syndicate went in on my account through my friends.*" (R. 1210).

On page 1227 of the Record is found the following expression by John McKeon:

> "I went into the big syndicate, by which the syndicate acquired 3,000,000 units of stock for $3,500,000, and was a subscriber and subscribed $300,000

thereto. My first subscription was $100,000 in the latter part of July, and then I subscribed $100,000 in the name of Art Delaney, to whom I owed $100,000, and he agreed to accept the membership in the syndicate for the $100,000. I put the money into the syndicate because I believed it needed it. I subscribed another $100,000 in the name of Mr. Siens, who was doing a good deal of work getting members and getting money into the syndicate. It was at a time when we depended entirely on the syndicate to raise the money necessary, *and I felt by putting a subscription in his name it would be an aid to him in inducing other people in putting money in.*"

In the reply brief of Shingle and Brown, on page 5, it is stated that the appellee incorrectly stated that the big syndicate, the day after the contract to purchase 6,000,000 shares of Italo stock at the price of $1.16 2/3 per unit was made, sold 500,000 units of the 6,000,000 shares at a minimum gross price of $2 per unit, less 20 per cent commission. What the appellee stated was that the directors of Italo, at a meeting held August 17, 1928, ratified and approved an agreement (Ex. 83) between Italo, Shingle, Brown & Company, Fred Shingle and Maurice Myers, dated August 13, 1928, and, also, ratified and approved an agreement (Ex. 84) made the same day between Italo and Maurice Myers, as Trustee. It was further stated, by Appellee, that by reason of these agreements Myers was authorized to deliver to Fred Shingle, as syndicate manager, 6,000,000 shares of Italo stock for the purchase price of $3,500,000, which was approximately $1.16 2/3 per unit. It was further stated, by appellee, that this syndicate, the day after this meeting,

sold 500,000 units of this stock to Vincent and Company at a minimum gross price of $2 per unit, less 20 per cent commission.

The appellants stated that the purchase price of the 6,000,000 shares of stock was determined some time in June and, therefore, the fact that this stock was sold to the public at a price of $2.50 a unit in August, 1928, would be no indication that this stock had this market value in June, 1928. In reply we state that the contract between the syndicate manager and Italo for the purchase of this stock was not made until August 13, 1928 (R. 302, 303), *and that before this contract was binding on Italo it had to be approved by the Board of Directors of that Company,* (R. 303) which approval was not given until August 17, 1928, the day before the syndicate sold the 500,000 units to Vincent and Company (R. 244). If Vincent and Company were able to sell the stock delivered to them at prices ranging from $2 to $2.50 a unit on August 18, 1928, it is safe to assume that this stock purchased by the big syndicate at a price of $1.16 2/3 per unit was on August 17, 1928, of a value of approximately $2 to $2.50 a unit, and that the directors of Italo at the time they approved the sale of this stock to the big syndicate knew that this stock had this market value.

There is evidence, however, that in June, 1928, Italo stock was much in demand by the general public, and that the price of this stock had risen considerably. Perata stated, on page 842 of the record:

> "I never advanced any money for the purchase of the Brownmoor stock because after the permit had been issued and the announcement of the sale of this

> stock it just went like a volcano, seeing the people come, and so forth."

The permit referred to by Perata was issued May 16, 1928 (R. 514).

The appellants, Shingle and Brown, refer to the first syndicate agreement in June, 1928, and the second syndicate agreement on July 12, 1928, and then state that the price of $1.16 2/3 per unit was therefore agreed upon on or about June 18, 1928. These two agreements are agreements between Fred Shingle, as syndicate manager, and the subscribers to the syndicate, and is not the agreement between the syndicate and Italo Petroleum Company. The agreement between the syndicate and Italo is Exhibit 83, which was not entered into until August 13, 1928, four days before the big syndicate sold the 500,000 units to Vincent and Company (R. 302, 303).

3. Wilkes Interested in Purchase of Brownmoor Stock.

In the reply brief of Wilkes, Siens, Cavanaugh and Myers it is stated on pages 1 and 2 that Wilkes was not interested in the purchase of the Brownmoor stock which was exchanged for Italo stock. The record discloses that Wilkes was interested in this stock. In addition to the testimony outlined in our Statement of Facts, the Record discloses that Masoni testified as follows, in reference to the purchase of this Brownmoor stock:

> "Wilkes said it was a good buy, *and he was buying that stock cheap enough that we were going to make some money out of it.* By 'we' I suppose he meant himself and whoever else was going to go in to guarantee that purchase of that stock by Frederic

> Vincent & Company. Wilkes told me he was going to be interested with Frederic Vincent & Company in buying that stock, and that is why he asked me if I wanted to be interested with Vincent and himself." (R. 827).

Perata testified (R. 842): "Wilkes said there was a chance of making some money out of the deal, but he did not tell me how much."

4. Purchase of McKeon Properties.

It is argued in the McKeon Reply Brief, on pages 8 to 18, that the McKeon properties were not purchased at an excessive price. In this reply reference is made to the testimony given by L. J. Byers, the former supervisor of accounting of Shingle, Brown & Company. This witness stated, according to the appellants, that if curtailment had not occurred the income from the McKeon properties would have amounted to approximately $5,000,000 over a period of approximately 4½ years. The basis for this conclusion of the witness is merely that the McKeon properties for a period of 2½ months in 1928 earned $246,000. From this it is concluded by the witness that if the production of oil had remained the same for 4½ years the production would have been approximately $5,000,000. It will be seen at a glance that this conclusion based only on 2½ months' operation is practically worthless. In addition, this witness stated, that he was unable to state how much of the 1928 production was settled production and how much was flush production.

The testimony of Thackaberry to the effect that he considered $2,123,829.93 to be the fair market value of

the property of the McKeon Drilling Company is attacked by appellants as unreliable, for the reason that Thackaberry was in no position to know the fair market value of McKeon properties. We submit that Thackaberry was sufficiently acquainted with the value of McKeon properties to state an opinion as to the same. He was Secretary and Treasurer of the Company and kept the financial records. That being the case, he certainly was acquainted with how much money was coming into the McKeon Drilling Company and how much was going out, and the value of its properties.

In our brief, however, we have outlined some of the testimony which indicates that the McKeon properties were purchased at an excessive consideration, and it is not our intention to again review this evidence. We believe, however, that one of the strongest indications that the price paid for the McKeon properties was excessive is the evidence that the McKeon Drilling Company actually received only 2,000,000 shares of stock, and that approximately 2,500,000 shares were distributed to the appellants and to some of the defendants in the court below. It is inconceivable, to us at least, that the McKeons would be willing to give away, for the reasons stated by them, 2,500,000 shares of stock if the properties were actually worth the purchase price paid by Italo. The reasons advanced for the distribution of these 2,500,000 shares of stock have been briefly commented upon in our brief. We submit the reasons given are so unreasonable and contradictory that they are evidence in themselves that the stock was given in accordance with a pre-existing understanding that this stock was to be

given back to the appellants and some of the defendants in the court below, which understanding was a condition precedent to the purchase of the McKeon properties. In other words, this deal is no different than the deal which Wilkes attempted to have Charles Behr agree to when the purchase of the White-Behr Consolidated Oil Company was being negotiated. (R. 564).

On pages 18 to 25 of the McKeon Reply Brief the appellants have undertaken to explain the statement of Lyons (Ex. 89), in which it is stated that 2,500,000 shares of the 4,500,000 shares are payable as commissions, leaving 2,000,000 shares as additional consideration to the McKeon Drilling Company. It is stated that the reference to commissions should be ignored as this witness was in no position to know whether the stock referred to was commissions or not. The information that this stock was commission stock, in the opinion of Lyons, was given to him by Mr. Thackaberry (R. 1104, 1105). Thackaberry testified that while he did not receive the information from any person that 2,500,000 shares were commissions, he did state that he received from Robert McKeon the information that the McKeon Drilling Company was to receive only 2,000,000 shares, and that this information was conveyed to Mr. Lyons (R. 322). Robert McKeon testified that his attention was called to the use of the word "commission" early in 1929 when Mr. Clay Carpenter told him that the reference to this stock as commissoins would be badly construed. Robert McKeon, however, did not change this entry in the books, but allowed it to remain as originally made (R. 1151).

5. Value of Italo Stock Involved in Modoc Deal Conducted by Myers.

On pages 2 and 3 of the Reply Brief filed by the appellant Myers, it is stated that there is no evidence as to the value of the Italo stock which Myers, Wilkes, Masoni and Siens received in exchange for Modoc stock which they had previously purchased at a price of about 60 cents a share. 10,000 shares of Modoc stock were purchased from a Mr. Gillespie. This stock was later exchanged for Italo stock, Wilkes, Masoni and Siens receiving 1231 units and Myers receiving 1231 shares of common and 1131 shares of prefererd stock. 100 shares went to Myers' secretary (R. 271). Myers himself testified (R. 1060) that the value of Italo stock at the time the exchange was made was more than the amount paid for the Modoc stock. He further stated that it was his recollection that the par value of the common stock was about a dollar or a little bit more and the preferred something under a dollar. It is argued that this might mean that the preferred stock was worth about 1 cent. We submit that the statement "something under a dollar" means something very close in amount to a dollar. Myers further stated "it was more than what we paid or I would not have bought the stock." (R. 1060).

II.

Answer to Appellants' Reply to Law Argument.

1. The Affidavit of Prejudice.

It is pointed out in the Shingle-Brown Reply Brief, on page 10, and in the McKeon Reply Brief on pages 27 and 28 that this case was not assigned to Judge Cosgrave

until February 6, 1933, at which time a new term of court began. The contention of the appellee is not that the affidavit of prejudice should have been filed ten days before the beginning of the term of court. If this case was first assigned to Judge Cosgrave on the first day of the new term of court, as appears to be the case, the affidavit of prejudice, of course, could not have been filed ten days before the beginning of the term. This fact, however, did not excuse the Appellant, Siens, from filing his affidavit at the very first opportunity after learning that this case was assigned to Judge Cosgrave for trial. Inasmuch, as pointed out in our brief, the appellant Siens contends in his affidavit that the Trial Judge evidenced prejudice against him on March 22, 1932 (R. 169-173) and on April 13, 1933 (R. 175-176) the affidavit, not being filed until May 20, 1933, was filed too late. Siens should have filed this affidavit immediately upon becoming aware that this case was assigned to Judge Cosgrave for trial. Siens in his affidavit admits that he had knowledge of the events of March 22 and April 13, long prior to the filing of his affidavit of prejudice. On page 185 it appears that Siens, in his affidavit, stated:

> "That he had no knowledge of any of the matters hereinbefore set forth in this affidavit, save and except that portion thereof that refers to the allegations contained in the bill of complaint filed in case W-62-C Equity and herein above referred to."

The situation in the present case is different than that present in the case of *Morris, et al. v. United States*, 26 F. (2) (8th Cir.) 444. In the *Morris case*, the defendant believed that previous conduct on the part of the

Judge evidenced prejudice against him, but was persuaded by his attorney that the conduct of the judge did not evidence this prejudice. Later, however, further conduct on the part of the trial judge convinced the defendant's attorney that this prejudice did exist. In the present case there is no statement in the affidavit that Siens attempted to file an affidavit before May 20, 1933, but was persuaded from doing so against his wishes and judgment.

The only conduct on the part of the trial judge, which the appellant Siens states he was not aware of until May 17th, is that conduct which was supposed to have occurred on May 2 and May 10, 1933. There is no showing, however, that his attorney was not aware of what took place on May 2 and May 10, and no reason is advanced by Siens for waiting from May 17th to May 20th to file the affidavit.

In *Chafin v. United States,* (CCA 4th) 5 F. (2) 592, 595, it is stated:

> "When the indictment is found after the term is begun the affidavit must be filed as soon as the disqualifying facts are known or good cause shown for delay."

The court also stated on the same page:

> "If there were no statutory requirements, the just and reasonable rule would be that a challenge to a judge for bias and prejudice must be made at the first opportunity after discovery of the facts tending to prove disqualification."

There is absolutely no showing whatsoever in the affidavit filed that none of the other appellants had no knowledge of the facts alleged in the affidavit until just before

the trial of this case. No excuse of any kind is offered by these remaining appellants for failure to file this affidavit before May 20, 1933.

It is stated on pages 37 to 40 of the McKeon Reply Brief and on pages 3 and 4 of the Wilkes, Siens, Cavanaugh and Myers Reply Brief, and on page 11 of the Shingle-Brown Brief that no objection was made in the lower court to the affidavit on the ground that it was filed too late or that separate affidavits should have been made by the appellants. In answer to this we state that the appellants are seeking to reverse this complaint on the ground that the trial judge erroneously proceeded to trial after the filing of this affidavit. We submit, therefore, that if the affidavit does not conform to the requirements of the statute which must be strictly construed *Keown v. Hughes,* (CCA 1) 265 Fed. 572, 576; *Henry v. Speer* (CCA 5) 201 Fed. 869, 872; *Benedict v. Seiberling,* 17 F. (2) 831, 836, the appellants are not entitled to have this complaint reversed on the ground now urged. This court is entitled to inquire into the legal sufficiency of the affidavit and compliance or non-compliance with the statute under which it is brought. If the appellants have not complied with the statute this court is justified in holding that the trial judge did not err in proceeding with the trial of this case. That the appellants did not comply with the statute is conclusively shown, we believe, on pages 65 to 86 of Appellee's original brief.

2. The Introduction in Evidence of Corporate Books and Records.

It is argued by the appellants, Shingle and Brown, on pages 11 to 21, that the books and records of the various

partnerships and corporatoins involved in the many dealings of Italo were erroneously introduced in evidence. The argument advanced is merely a recapitulation of the argument advanced by the appellants in their original brief filed. We believe we have, in our original brief, fully answered the arguments advanced by the appellants and do not believe it necessary to reaffirm what has been said by us in our original brief.

3. The Summaries of Witness Goshorn.

On pages 41 to 65 of the McKeon Reply Brief, on pages 21 to 33 of the Shingle-Brown Reply Brief, and on pages 4 to 7 of the Wilkes, Cavanaugh, Siens and Myers Brief, the same argument advanced in the original briefs filed by the appellants as to why the summaries of Goshorn are supposed to have been inadmissible in evidence is reiterated. An attempt is again made to demonstrate that these summaries and the testimony given in relation to them are erroneous conclusions, and are inadmissible, as based in part on sworn testimony and in part on one set of books not introduced in evidence.

We have sought, in our original brief, to point out that Goshorn, in his summaries, merely undertook to relate what the books and records examined by him disclosed. While it is true that in designating certain stock he used the word "bonus," this word was used merely as a convenience in designating that portion of the stock distributed to the appellants here and some of the defendants in the court below.

As pointed out in our original brief, none of the appellants contended that the 80,000 shares of Italo stock given

to the subscribers of the $80,000 syndicate was not "bonus" stock. In fact, some of the appellants admitted that this stock was "bonus" stock and themselves regarded it as such and so called it. Wilkes testified (R. 708) that this stock was to be given to the syndicate "as a bonus for the loan." The appellant Shingle testified (R. 886) that after the $80,000 loan was agreed upon:

> "Vincent said that the bonus stock would be put up * * *."

Surely if the appellants themselves on the witness stand saw fit to call this stock "bonus" stock the reference to this stock as such by Goshorn should not be regarded as prejudicial to the appellants.

All the witness Goshorn did was to use the same word, later employed by the appellants themselves, to differentiate between the 80,000 shares of stock given to the syndicate members, and the remainder of the stock. In effect then, Goshorn said merely that the stock, referred to by the appellants at the time of the formation of the $80,000 syndicate as "bonus" stock was, according to the books and records examined, given to the appellants named in his summary, (Ex. 299). Thus, it can be seen, Goshorn did not state certain stock was in fact "bonus" stock, but merely stated that the stock so classified by the appellants themselves was distributed in a certain manner. This the Jury well understood, for it was brought out in the extensive examination of this witness.

The word "bonus" on Ex. 297 was used to designate the 2,500,000 shares of Italo stock described on the books of the McKeon Drilling Company as "commission" stock (R. 601, 603). It was made clear to the jury that this

word was merely used to distinguish the stock referred to as "commission" stock from other stock.

The witness at no time attempted to have the jury believe that any of the stock referred to was in fact "bonus" stock. For he readily stated from the witness stand that the word was his own expression, used to differentiate the 80,000 shares of stock and the 2,500,000 shares of stock from the other stock.

Even if it be considered that Goshorn did state that certain stock was in fact "bonus" stock, which cannot be done, and even if this is regarded as an erroneous conclusion of the witness, which we deny, still the record discloses that the court, of its own volition and without any previous objection by counsel for appellants (a thought only being expressed R. 601) told the witness he should not designate the 2,500,000 shares of stock as "bonus" stock (R. 601) and suggested that the stock be designated as "commission" stock. To this suggestion the prosecuting attorney agreed and the change was made. No stated objection was made to this change, and no exception noted (R. 602, 603). It is clear, therefore, that the witness was not allowed to designate this stock as "bonus" stock. Since this word was stricken, we fail to see how it can now be contended that the witness was erroneously permitted by the court to designate certain stock as "bonus" stock. The court likewise refused to allow the word to be used in reference to Exhibit 299 (R. 641).

Counsel for the McKeons, on page 44 of the Reply Brief, complains of the word "commission" used to designate the 2,500,000 shares of stock. This designation is

made in the McKeon books and certainly Goshorn cannot be blamed because it was so used there. Robert McKeon himself knew that this word was used in these books, but was evidently satisfied with the designation, as he didn't see fit to change it (R. 1151).

Counsel for appellants, in attempting to demonstrate that Goshorn has been guilty of erroneous conclusions, have ignored the quite evident fact that this witness undertook to narrate and summarize only what the books and records disclosed. This is made clear by the statement contained on page 45 of the McKeon Reply Brief, to the effect that the word "commissions" was unwarranted. In attempting to demonstrate the truth of this statement the following testimony of Goshorn is quoted:

> "Technically I imagine you would not call all of the two million five hundred thousand shares of stock as 'commission.' "

That the witness attempted only to narrate what the books and records showed is evidenced by the above, for while Goshorn did not entirely agree that all of the 2,500,000 shares of stock was "commission" stock, he, nevertheless, designated this as "commission" stock for the reason that it was so designated in the books he examined. In other words, he did not allow his view to prevent him from designating the stock as it was designated on the McKeon books.

In other attempts at demonstrating that Goshorn's summaries are unreliable, it is pointed out that certain stock which was traced to certain defendants was later according to the defendants, transferred, disposed of, or used for various reasons as stated by them. Again we find

that appellants ignore the testimony of Goshorn to the effect that he had attempted only to trace the stock, in most instances, to the names of those persons to which the stock was first transferred (R. 625). He did not undertake to discover what those persons did with the stock after receiving the same. That being the case, the supposed inaccuracies of Goshorn's summaries, pointed out on pages 46 to 48 of the McKeon Reply Brief, are non-existent.

Counsel for appellants contend that Goshorn is not an expert accountant. We submit he was qualified as such and proved his qualifications (R. 643, 644). At no time did the appellants contend that this witness had not qualified as an expert. In our original brief on pages 127 to 128, we have cited authorities holding, in effect, that conclusions and summaries and opinions of expert accountants, based on book entries are properly received in evidence. In addition to the cases there cited we call this court's attention to *Lewis v. United States,* (CCA 9th) 38 F. (2d) 406, 411 and *Mitchell v. United States,* (CCA 9th) 23 F. (2d) 260, 263.

In the *Lewis case,* cited above, the court stated:

> "One of the principal objections to the expert's deductions from the books and records is that his statements were conclusions, and therefore inadmissible, but the reason for utilizing an expert accountant is that he may explain the technical significance of the account books, that is, of the nature and character of the entries, whether debit and credit, etc., and to deduce therefrom whether the books do or do not show certain facts in issue."

In answer to the appellants' contention, made in the Reply Briefs, that the testimony of Goshorn was inadmissible, for the reason that it was based in part on the books and records of the Wilkes, Cavanaugh partnership, which were not introduced in evidence, we again state that inasmuch as these books and records were in the possession of the appellants, Wilkes and Cavanaugh (R. 286), the Government could not produce them and, therefore, was not required to introduce them in evidence. The books were shown to be in the possession of the appellants and the Government therefore was without power to require their production at the trial. *Boyd v. United States,* 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Eddington v. United States,* (CCA 8) 24 F. (2d) 50; *Hanish v. United States,* (CCA 7) 227 Fed. 584, 585.

In the *Hanish case,* cited with approval in the *Eddington case,* the court stated:

> "That the defendant could not be compelled to produce any document constituting a link in the chain of evidence against him."

In *Lazanski v. United States,* (CCA 4) 31 F. (2d) 846, the defendants, who were partners, voluntarily showed books and records of the partnership to Government agents and left them in their possession for auditing. The books and records were later returned to the defendants. The accountants later were allowed to testify as to the contents of the books and records examined. It was claimed that this was error. The court stated on page 850 of the Reporter:

> "The next point strenuously insisted upon by defendants is that the trial court erred in allowing

agents of the government to testify as to the contents of books and records of defendants, and in permitting photostatic copies of certain pages of these to be introduced in evidence. The basis of these objections is, first, that the oral testimony and the photostatic copies were received in violation of the best evidence rule; and, second, that the evidence was obtained in violation of the rights of defendants under the Fourth and Fifth Amendments to the Constitution. We see nothing in either of these points.

"So far as the best evidence rule is concerned, the government complied with this rule, in that it produced the best proof which could be produced under the circumstances of the case. The books were shown to be in possession of the defendants; and, because of the provisions of the Fourth and Fifth Amendments, the court was without power to require their production at the trial. * * * But evidence as to the contents of books and papers is not lost to the government because the defendant has them in his possession and their production cannot be ordered or the usual basis laid for the introduction of secondary evidence. In such cases, the rule is that, when they are traced to his possession, the government, without more ado, may offer secondary evidence of their contents."

4. **Submission to Jury of Westbrook Affidavit and Summaries of Goshorn.**

In the Shingle, Brown Reply Brief, on pages 33 to 36, it is stated that the fact that the same information contained in the Westbrook affidavit (Ex. 155) was contained in the Cavanaugh affidavit (Ex. 277), which was admitted in evidence, should not be considered by this

court, for the reason that the Cavanaugh affidavit was admitted in evidence over the objection of these appellants. Reference is made to page 538 of the record. An examination of this page discloses that none of the appellants other than Cavanaugh objected to the introduction in evidence of the Cavanaugh affidavit. The record cites that "Cavanaugh's counsel objected to it as incompetent, irrelevant * * * etc." A few lines later it appears that Cavanaugh's attorney expressly ordered that the whole of this affidavit be read to the jury. This was then done without any objection on the part of any of the appellants.

It is further stated by these appellants that the belief, expressed in the Westbrook affidavit, that the Big Syndicate would make a profit out of the purchase of Italo stock, may have tended to lead the jury to believe there was fraud in the transaction. This expressed belief on the part of Westbrook, however, is not the only reference found in the record to a belief in profits to be made out of this purchase of stock. As pointed out in our original brief, it is not denied by any of the appellants that they expected to make a profit out of the operations of the Syndicate. Some of the appellants even testified that they expected to make a profit. The appellant Shingle testified that:

> "A profit was expected. No one would go into a syndicate of any kind unless they expected to make a profit." (R. 929).

It is clear, therefore, that the belief of Westbrook was no different than the belief of the appellants, which was voluntarily expressed by them to the jury.

In the McKeon Reply Brief, on pages 65 to 71, it is stated that Westbrook's statement to the effect that Wilkes and Siens were building a yacht might have lead the jury to believe that Wilkes and Siens were using, for their personal pleasure, the money received as the result of the McKeon deal. This assumption is too far-fetched to be worthy of consideration. In addition, it is unwarranted, for the reason that the Cavanaugh affidavit, introduced in evidence without objection on the part of the appellants, expressly stated that this yacht was purchased for business reasons and was to be used in taking over a Government oil grant in Central America.

In considering this affidavit of Westbrook, it should be remembered that it was introduced in evidence only against Westbrook, and this was stated in the presence of the jury by the prosecuting attorney (R. 435, 436). The court also stated to the jury:

> "The document is admissible only as against the defendant Westbrook, *and is not evidence and not to be considered by you as evidence against any of the other defendants here on trial, gentlemen.*"

The court, in addition, informed the jury, in its charge, that all of the evidence introduced was not applicable to all the defendants. (R. 1291). In *Pennsylvania Company v. Roy,* 102 U. S. 451, 26 L. Ed. 141, it was stated that the presumption is that the jury will regard and obey the instructions of the judge.

In answer to appellee's statement that the appellants did not even consider the use of the word "bonus" prejudicial at the time the two summaries of Goshorn were admitted in evidence, it is stated in the McKeon Reply

Brief that such a ground of objection need not have been specifically stated in the objection made to these exhibits. This statement is no answer to appellee's contention. While we do seriously question the sufficiency of the objection made, we do contend further, however, that the fact that the use of the word was not objected to as prejudicial is a good indication that this word was not regarded as prejudicial. If it was so regarded, counsel at the time would have so stated. The fact that it was not claimed that this word was prejudicial is an indication, at least, that the possibility of prejudice never even occurred to appellants' counsel at the time the exhibits were offered in evidence.

And this is not to be wondered at, for it was clearly brought out before the jury that this word was merely used, in tracing a great number of shares of stock, to differentiate certain stock from other stock and was not to be regarded as an indication that certain stock was in fact "bonus" stock.

The jury was well aware that the word "bonus" was stricken, and that it was not to be regarded as evidence that certain stock was in fact "bonus" stock. At various times during the testimony of Goshorn, this was recalled to the attention of the jury. On page 601 it appears that the court stated to the witness, "You should not designate it 'bonus' stock." On page 602 the word "bonus" was stricken, and the word "commission" substituted. On page 629 appears the statement of Goshorn that "No. 16 says 'bonus,' which I believe we have agreed was stricken out."

The jury, by reason of the above, were well aware that the word "bonus" was stricken and therefore not in evidence. In addition, the trial court instructed the jury that the jury was not to regard evidence which was stricken out by the court, and the jury was expressly told that such evidence was to be regarded by them as though it had never been given. (R. 1268). We wish also to call the court's attention to the fact that no mention is made in Westbrook's affidavit of any appellant other than Wilkes and Siens, and the reference to Wilkes is merely in connection with the purchase of a yacht, which purchase was also referred to in the Cavanaugh affidavit, admitted in evidence without objection by any of the appellants, other than Cavanaugh.

5. Cross-examination of Witness Goshorn.

On pages 57 to 58 of the Shingle, Brown Reply Brief, it is stated that, inasmuch as the witness Goshorn testified on cross-examination that the item of $578,260.63 charged to Shingle, Brown & Company was shown on the books of that company as a profit, and inasmuch as the witness on cross--examination testified that Shingle, Brown & Company split the proceeds of the Bank of Italy escrow four ways with Siens, Wilkes and the McKeon Company, and no consideration was paid the escrow and, inasmuch as the witness on cross-examination testified that he didn't know what consideration was received by McKeon for the stock delivered to the various appellants, it was error to refuse counsel for Shingle and Brown to ask this witness what operating expenses Shingle, Brown and Company incurred for the years 1928 and 1929.

It will be immediately noted that proof that Shingle, Brown and Company had office expenses in 1928 and 1929 would in no way refute the testimony that $578,260.63 was placed on the books of Shingle, Brown and Company as a profit. The witness did state, however, that this amount was not "net profit," but was the "net amount received." (R. 665). It likewise would not refute the testimony that the Bank of Italy escrow was split four ways and no consideration was paid the escrow. It would likewise not refute the testimony that the witness did not know what consideration was received by McKeon for the stock delivered to the appellants.

For the reasons advanced above and for the reasons advanced on pages 163 to 164 of our original brief, we submit there was no improper restriction of cross-examination. The extent of cross-examination is left to the discretion of the trial judge. *Jelke v. United States* (CCA 7) 255 Fed. 264, 287, 288; *Postman v. United States* (CCA 8) 34 F. (2d) 406, 408; *Quigley v. United States* (CCA 1) 19 F. (2d) 756, 759. We submit that the trial court was guilty of no abuse of this discretion.

The appellants' statement that "it should be further observed that in giving the testimony that no consideration was received or evidenced by the books that the witness was testifying to a negative matter which was improper under the rule enunciated by this court in the recent case of Shreve v. United States, decided April 29, 1935," is without justification or merit and is now raised for the first time. This objection was not made in the court below nor in the original brief filed and should not now be considered. In addition, this testimony was not

brought out by the Government, but by the appellants during cross-examination. In reference to the Bank of Italy, escrow, the witness, although first stating that no consideration was paid the escrow, later made a correction and stated that "the consideration for that direction from the escrow is not indicated." The testimony therefore is not testimony concerning a negative matter.

6. The 12th Count of the Indictment.

On pages 58-60 of the Shingle-Brown reply brief, it is stated that appellee concedes the court did not instruct the jury it must find that the letter contained in the twelfth count was delivered by mail. We did not and do not concede this, but contend that the jury was sufficiently informed as to the necessity of proving delivery. We have argued this point at considerable length in our original brief on pages 208-213 and will not therefore reargue it. We merely point out, however, that the trial court read to the jury the particular section of the statute involved in count 12 (R. 1279), and further stated it was necessary that the jury find the letter "passed through the mails" (R. 1282). In addition the court gave the indictment to the jury and told the jury that it must find that the defendants "used the United States mails in the manner alleged in the indictment" (R. 1282).

Appellants did not request an instruction as to the necessity of proving the delivery of the letter set out in the twelfth count of the indictment, (R. 1304-1324), nor did they request that the trial judge further amplify the charge given. In *Allis v. United States,* 155 U. S. 117, 122, 15 S. Ct. 36, 38, 39 L. Ed. 91, it is stated:

> "A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions. * * * However, it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception."

In addition, no exception was taken in reference to the supposed failure of the trial court to instruct as to the necessity of proof of delivery. In *Dinger v. United States* (CCA 8th) 28 Fed. 2d. 548-550, and in *United States v. McGuire* (CCA 2nd) 64 Fed. 2d. 485-493, it was held that a failure to charge on the presumption of innocence was not a ground for reversal where no request was made for such instruction and no exception preserved.

A general exception was taken to the whole charge (R. 1325) but this presented nothing for review. In *Block v. Darling*, 140 U. S. 234, 238, 11 S. Ct. 832, 35 L. Ed. 476, it was stated:

> "The general exception 'to all and each part of the foregoing charge and instructions' suggests nothing for our consideration. The court below was entitled to a distinct specification of the matter whether of fact or of law to which objection was made * * *. An exception 'to all and each part of the charge'

> gave no information whatever as to what was in the mind of the excepting party, and, therefore gave no opportunity to the trial court to correct any error committed by it."

The exception found on page 1327 of the record and referred to by counsel for appellants in their Reply Brief on page 60 was not an exception to the supposed failure to instruct on the necessity of proof of delivery. Counsel has quoted only part of this exception, beginning with the middle of the sentence. The beginning of the sentence containing the exception is as follows:

> "We except to the instruction given to the court *relating to the mailing of any mail matter by clerks or employees as being sufficient proof that any defendant had anything to do with that* * * *" (R. 1327).

Immediately after that portion of the exception, quoted above, is found that part of the exception quoted on page 60 of the Reply Brief. It is clear, therefore, that this exception had reference only to the mailing by clerks, etc., and not to the necessity of proof of delivery.

In *Mouler v. Am. Life Ins. Co.*, 111 U. S. 335, 337, 4 S. Ct. 466, 28 L. Ed. 447, it was stated:

> "If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed."

7. The Bill of Particulars.

On pages 43 to 57 of the Shingle-Brown reply brief an attempt is made to point out wherein the appellee com-

mitted error in construing the indictment as restricted by the Bill of Particulars. We submit that the appellee has committed no error in construction. The only error pointed out is one which the appellee has already pointed out to this court in the oral argument. As stated by appellee at that time, the reference, on page 150 of appellee's brief, to subdivision (o-1) of the Bill of Particulars was erroneous. The reference should have been to (o-3). The appellee, however, correctly listed on page 151 of the original brief those persons who were referred to under subdivision (o-3).

The appellant admits that the appellee's construction of the indictment, as restricted by the Bill of Particulars, in reference to the $80,000 loan is correct. On page 45 of the Reply Brief it is stated the terminology "that the said defendants," appearing in the indictment on the last line of page 29 of the record, does not refer to all defendants. The Bill of Particulars is silent as to what persons are meant by "the said defendants." Inasmuch as all the defendants are charged with having participated in a scheme to defraud and inasmuch as the Bill of Particulars does not attempt to limit the terminology "the said defendants," the only reasonable conclusion which can be arrived at is that the terminology used means all of the defendants indicted. This is made clear by reference to the terminology *"and while some of the said defendants* were acting as directors and officers of said corporation," appearing on lines 3 and 4 of the indictment as the same appears on page 30 of the record. "Some of the said defendants," according to the Bill of Particulars, refers to Robert McKeon.

Wilkes, Perata and Masoni. From this it is ascertained that it was not only the officers of Italo who were charged with causing Italo to enter into an agreement to purchase the assets of the Brownmoor Oil Company. The reference to these officers was merely that the agreement to purchase was caused by the defendants while these named officers were acting as such.

On page 46 of the Reply Brief it is stated that appellee committed error in including Shingle and Brown as those named in the indictment and Bill of Particulars as issuing the stock to Brownmoor. We submit that Shingle and Brown were included in the indictment. The allegation of the indictment is found in the third paragraph, page 31 of the Record, and the terminology "that the defendants" is shown by Footnote 16 to refer to the original indictment at page 5, lines 6 and 7. The Bill of Particulars (R. 155; par. 4, subd. "i") designates "the defendants" as those named in subparagraphs "e" and "f" thereof. Under subdivision "f" the Bill of Particulars refers to subdivision "e". Subdivision "e" refers to the defendants named in subdivision "b" and also certain named defendants. Subdivision "b" has two references. One is to subdivision "a" and also refers to certain defendants. Subdivision "a" refers, among other defendants, to Shingle and Brown. (R. 155-154.)

On page 47 of the Reply Brief appellants complain that the appellee stated that the indictment alleges that "all of the defendants applied to the Corporation Commissioner for a permit to issue the Italo stock to the Brownmoor Company." Again, we find that while the indictment alleges "it was further a part of said scheme

and artifice that the defendants should and they did make application * * * , the bill of particulars is silent as to the names of these defendants. The indictment, therefore, not being restricted by the bill of particulars, should be construed to mean all of the defendants.

We have already discussed in our original brief the fact that there are inconsistent references in the bill of particulars to those defendants who received part of the 2,500,000 shares of stock distributed by the McKeons. In two places Shingle and Brown are charged with having received this stock under a secret arrangement and agreement. (R. 153; par. 1, B. of P.; R. 157; B. of P. "o-5"; R. 157; B. of P. "o-3".) This has been fully discussed in our original brief on pages 150 to 154, so we will not now again comment on this. Appellants, however, state that the reference in the bill of particulars (subparagraph (o-5) R. 157) to line 9 of the indictment does not refer to terminology "and that they, the said defendants, should and did receive for their own use and benefit * * * " appearing on page 36 of the Record. An examination of the bill of particulars, however, discloses that it refers to page 8, line 9 of the indictment. This can mean nothing but that it refers to the language of the indictment quoted immediately above.

The purpose of our reply is merely to point out that the inconsistencies which appellants claim exist in the appellee's construction of the indictment, as restricted by the bill of particulars, do not exist. We refer this court, therefore, to our argument on the bill of particulars contained in the original brief on pages 136 to 156.

8. Instructions of Court in Reference to Fiduciary Relationship.

On pages 54 to 65 of the McKeon Reply Brief the appellants again point out their view that the court, in its instructions to the jury on the fiduciary relationship existing between officers of a corporation and a corporation, spoke only of constructive fraud and therefore committed error prejudicial to the appellants. It is also undertaken by appellants to excuse their failure to take proper objection and exception to the particular instructions now complained against.

The appellants on page 56 of their reply brief state that the appellee's definition of actual fraud is erroneous, and point out that before there can be actual fraud the "suppression of that which is true by one having knowledge or belief of the fact" must be with "intent to deceive another party thereto or *to induce him to enter into the contract.*" We assume, therefore, that appellants do admit that if the suppression was made with the intent to deceive or to induce one to enter into a contract actual fraud does exist. With this in mind, let us examine the charge of the court as to what constituted actual fraud. On page 1288 of the record the trial court stated:

> "Actual fraud as defined by the law of the state is * * * the suppression of that which is true by one having knowledge or belief of the facts and who is under obligation to reveal it; a promise made without any intention of performing it; *and any other act committed to deceive. The intent to defraud must exist at all times.*"

From the above, it is clear that the trial court did instruct the jury that actual fraud must exist in the matter of secret profits, and that it must have been committed with the intent to deceive. In this connection, we quote the language of the appellants on page 56 of their reply brief:

> "If the lower court had confined itself to the giving of a definition of actual fraud, the complaint here urged would not have been made."

In our original brief on pages 224-226, we set out the instructions of the judge dealing with the intent to defraud. We submit that these instructions clearly and definitely informed the jury that it was necessary that the Government prove and the jury find beyond a reasonable doubt that the intent to defraud existed. That being the case we fail to see how the appellants can successfully contend that the jury was not properly informed as to the necessity of proving this intent to defraud.

Although the appellants object, on review, to the giving by the trial judge of instructions on the fiduciary relationship between an officer of a corporation and the corporation, we find that no objection whatsoever was made to the fact that the judge gave these instructions. Indeed the appellants themselves sought to have the court instruct on the relationship between directors and their corporations. This is evidenced by the tendered instruction contained on page 1323 of the transcript of record and the instruction contained on page 1540-1541. It is not understandable to us how appellants can suc-

cessfully contend that the trial court committed error in instructing on a point which the appellants themselves requested the court to instruct on.

In an attempt to convince this court that proper objection and exception was taken, not to the giving of instructions on fiduciary relationship, but to the contents of the instructions given, the appellants on pages 62 and 63 of their reply brief set out some of the exceptions taken to the instructions given by the trial court. The first exception outlined was merely to the effect that the exception was made on the ground that an officer of a corporation does not owe any fiduciary duty to any one except the corporation or its then existing stockholders. The second exception outlined was similar to the first in that the exception was taken to the statement of the court that it was the duty to disclose to prospective purchasers that profits may or may not have been made. The third exception was to the illustration given by the court and did not in any way refer to what appellants call constructive fraud. The ground of the objection was that the court had gone outside the record and called upon his personal experience. In reference to this exception it is to be noted that it is stated on page 413 of the original brief filed by the McKeons that the court, in giving the hypothetical case, properly enunciated the principles under which a corporation could recover from a director secret profits. The fourth exception outlined is to the instructions of the court on secret profits and is based on the ground that the court did not define what constituted a secret profit.

It is apparent then that the objections now urged to the instructions of the trial court were not pointed out to the trial court. That being the case this court should not now undertake to consider the correctness of the instructions on the ground now claimed.

> "If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed."
>
> *Mouler v. Am. Life Ins. Co.*, 111 U. S. 335, 337, 4 S. Ct. 466, 28 L. Ed. 447.

9. The Eighth Count of the Indictment.

On pages 8 to 16 of the Reply Brief filed by appellant Myers, it is contended that the authorities cited by the appellee, to the effect that the use of the mails and not the written word is the gist of the crime, and that the letter sent through the mails need not be sent out in haec verba unless it touches the very pith of the crime, are not applicable to the present case. We submit that notwithstanding the appellants' view the cases cited are applicable as can readily be determined by a reading of the same and we will, therefore, not attempt in this Reply Brief to justify the citation of the same.

We do wish to point out, however, several erroneous statements made in this argument. On page 9 of the brief it is stated that the Government is in error in stating that no application was filed by the defendant Myers for a Bill of Particulars. We reaffirm our statement that the record does not disclose that Myers applied for a Bill of Particulars. A Bill of Particulars was re-

quested only by the McKeons (R. 15), and by Shingle, Brown, Jones and Mickel (R. 16). On page 16 of the Reply Brief it is stated that the Government "responsive to the order of the court granting the Bill of Particulars, should have supplied the defendants and each of them, not only with a copy of the alleged circular, but under the authorities submitted by us to a translation thereof so that they might have imparted information as to the contents of the same."

The only Bill of Particulars embraced in the transcript of the record is a Bill of Particulars filed by Shingle and Brown, and nowhere in the same does it appear that any request was made that a Bill of Particulars be furnished as to the contents of the circular set out in the Eighth Count of the indictment (R. 146-153). It is clear, therefore, that the statement of Myers quoted above has no merit and is without any basis, for it appears affirmatively from the record that the court never did order the Government to furnish a bill of particulars as to the circular contained in the Eighth Count.

III.

Conclusion

In this reply brief, appellee has attempted to refrain from repeating the arguments advanced in the original brief filed and has attempted to answer only those points raised in the reply brief of the appellants which the appellee thinks require a reply. We believe, however, that those portions of the reply brief, filed by the appellants, which have not been expressly answered in our reply brief have been fully covered in the original brief

filed by the appellee, and we request this court to consider the original brief along with this reply brief in determining the merit of the points raised by appellants. We submit that in the original brief, and in this our reply brief, we have successfully and completely answered the various contentions of the appellants and for the reasons advanced by us in these two briefs we respectfully request that the judgment of conviction entered against each and everyone of the appellants be affirmed.

Respectfully submitted,

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